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AUTHOR Moshman, David
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ABSTRACT

Children should have the same First Amendment rights as adults except when it can be empirically shown that the children in question differ from minimally normal adults in relevant intellectual competencies and would, as a result, be likely to suffer harm if accorded full First Amendment liberties. In this paper, specific principles derived from this general perspective are proposed. Application of the principles raises empirical questions about the ability of children at various ages to critically analyze what they are exposed to, coordinate multiple points of view, distinguish the personal ideas and religious activities of classmates from government-endorsed values and quidelines, and understand their rights to form and express their own ideas and to act in accord with their own religious views. The proposed principles help identify the sorts of empirical evidence relevant to public school controversies, clarify how such evidence may be applied in a legal context, and highlight areas in which the need for further research is particularly critical. The principles are applied to controversies surrounding censorship of student expression, student freedom of association, selection and removal of textbooks and school library books, religion and prayer in public schools, secular humanism, evolution/creation, and values and morality in education. (RH)

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CHILDREN'S FIRST AMENDMENT RIGHTS:

LEGAL AND EMPIRICAL ISSUES

David Moshman

University of Nebraska--Lincoln

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The First Amendment

Congress shall make no law
respecting an establishment of religion,
or prohibiting the free exercise thereof;
or abridging the freedom of speech,
or of the press;
or the right of the people peaceably to assemble,
and to petition the government for a redress of grievances.

General Perspective

1. Children are persons under the Constitution and thus have First Amendment and other constitutional rights. The U.S. Supreme Court has consistently recognized this since 1967 (In re Gault, 1967; Tinker v. Des Moines, 1969).

2. The Fourteenth Amendment requires that states, as well as the federal government, respect the liberties guaranteed by the First Amendment. The First Amendment does not, however, apply to private exchanges between individuals acting in purely personal capacities. With respect to children, then, the First Amendment applies to their relations with public schools but not, in general, to their relations with parents or private schools.

3. Application of the First Amendment to the rights of children in public school controversies often raises empirical questions. Psychological research is thus often necessary to resolve the legal issues.

4. Even when psychological research is necessary to resolve legal issues, it is generally not sufficient. A legal framework is necessary to identify the relevant empirical considerations and to determine the implications of empirical findings.

Presented at the meeting of the Society for Research in Child Development, Baltimore, April 1987. Portions of this presentation are adapted from Moshman (1986). An extended version will appear in Moshman (in preparation). Author's address: Educational Psychology, 1312 Seaton Hall, University of Nebraska, Lincoln, NE 68588-0641.

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Children's First Amendment Rights: Six principles

These principles represent my analysis of how the First Amendment should be interpreted with respect to children (for their derivation and justification, see Moshman, 1986, in preparation). They are thus presented as a systematic theory of children's First Amendment rights, not as a summary of current judicial decisions.

1. Free Expression. Government may not hinder children from forming or expressing any idea unless the abridgment of belief or expression serves a compelling purpose that cannot be served in a less restrictive way.

2. Freedom of Nonexpression. Government may not require children to adopt or express a belief in any idea.

3. Limited Inculcation. (a) Government may inculcate ideas only when it has a legitimate purpose for doing so (e.g., to produce educated citizens). (b) Inculcation may not have the advancement or hindrance of any religion or of religion in general as its purpose or principal effect. (c) Government may not indoctrinate children--that is, inculcate ideas in a way that unnecessarily limits the possibility of critical or rational analysis.

4. Freedom of Access. Government may not restrict a child's access to ideas or sources of information unless the restriction serves a compelling purpose that cannot be served in a less restrictive way.

5. Free Exercise of Religion. Government may not restrict children from acting in accord with their religious beliefs unless the restriction serves a compelling purpose (e.g., to prevent disruption of education or perceived establishment of religion in a public school) that cannot be served in a less restrictive way.

6. Nonarbitrary Distinction of Child from Adult. Government may restrict children's First Amendment rights (relative to those of adults) on the basis of children's psychological characteristics (e.g., limited intellectual competence) if and only if (a) children of the age in question are empirically shown to differ in the relevant respect(s) from minimally normal adults; (b) the demonstrated difference is of such a nature and extent that substantial harm is likely unless First Amendment freedoms are abridged; and (c) the potential harm outweighs First Amendment interests.

Applications

The six principles presented in the previous section are useful in resolving a wide variety of public school controversies, including those surrounding (a) censorship of student expression, (b) student freedom of association, (c) selection and removal of textbooks and school library books, (d) religion and prayer in public schools, (e) secular humanism, (f) evolution/creation, and (g) values and morality in education. With respect to each controversy, I briefly define the issue, summarize the present legal status of the issue as decided by the courts, provide a legal analysis based on my own six principles, note the relevant empirical considerations, and provide my own conclusions.

Censorship of student expression

Nature of issue. Do students have the right to express themselves orally (e.g., by stating their political views), symbolically (e.g., by wearing a black armband to protest a government policy), dramatically (e.g., by choosing and performing in school plays), and in writing (e.g., via student newspapers)?

Current status. Courts have ruled that school newspapers have substantial First Amendment protection (Ingelhart, 1986) and the Supreme Court has explicitly noted First Amendment protection of student oral and symbolic speech (Tinker v. Des Moines, 1969), though a recent decision limits this by upholding the authority of school officials to enforce standards of "civility" (Bethel v. Fraser, 1986).

Legal analysis. My own constitutional analysis suggests that public schools should have authority to censor student expression only if they can demonstrate a strong likelihood of harm or disruption of education (Principle 1).

Empirical considerations. This is no evidence that children are commonly harmed by what they are permitted to say and much evidence that intellectual development is facilitated by the opportunity to form and express one's own views (Moshman, 1986, in preparation).

Conclusion. With the exception of obvious rules of courtesy for maintaining order and permitting education within classrooms, limitations on student expression are rarely justified. Tinker laid out the appropriate principles in this area; Bethel was an unprincipled exception.

Student Freedom of Association

Nature of issue. Should voluntary groups of students be permitted to meet on public school premises (e.g., after school)? This has typically come up with respect to whether public schools are constitutionally required, permitted, or forbidden to allow student religious groups to meet in the school.

Current status. The Supreme Court has ruled that public colleges and universities must permit voluntary student religious groups to use campus facilities on the same basis as any other noncurricular group (Widmar v. Vincent, 1981). The Equal Access Act, passed by Congress in 1984, requires public secondary schools to follow the same policy. The constitutional status of equal access is currently being litigated (Mergens v. Westside, 1987).

Legal analysis. Forbidding voluntary religious groups to meet on the same basis as any other group infringes on the freedom of expression and free exercise of religion of religious students (Principles 1 and 5). Depending on student perceptions, such a policy may also inculcate an anti-religious ideology, contrary to Principle 3b. On the other hand, to permit such religious meetings on school premises may also violate Principle 3b in that other students may perceive school (and thus government) endorsement of particular religions or religion in general.

Empirical considerations. The legal analysis suggests a genuine dilemma. The best resolution depends largely on student perceptions and thus raises empirical questions. The Supreme Court explicitly noted in Widmar that its decision was based on its assumption that college students are mature enough to distinguish voluntary student groups from educational activities whose content is determined or endorsed by the school. Empirical evidence concerning the ability to understand abstract distinctions of this sort suggests that adolescents probably would understand (or could be made to understand) the relevant distinction but that younger children, regardless of explanation, would be likely to incorrectly perceive school endorsement of voluntary groups meeting on school premises (Moshman, 1987).

Conclusion. The reasoning in Widmar was correct and, on the basis of empirical evidence concerning adolescent cognition, may be applied to secondary schools. The Equal Access Act is thus constitutional. An analogous act for elementary schools, however, would violate the establishment-of-religion clause of the First Amendment and my Principle 3b due to the limited intellectual abilities of elementary children. Although this conclusion is based on extensive research concerning the development of abstract reasoning, it would be useful to have more specific data concerning the development of conceptions about separation of church and state and related issues.

Selection and Removal of Textbooks and School Library Books

Nature of issue. Do school officials have unlimited authority to determine curriculum, select and remove textbooks, and select and remove books from the school library? If not, what constraints apply?

Current status. The Supreme Court, in a badly fragmented decision consisting of seven distinct opinions, has suggested that, although school boards are elected or appointed to set educational policy and must have considerable leeway to do so, their power may be limited by the First Amendment rights of students (Island Trees v. Pico, 1982).

Legal analysis. Principle 4 obviously cannot be interpreted to require schools to include every possible idea in their curricula and every published book in their libraries. It does, however, require that books chosen for legitimate educational reasons may not be removed simply because parents, teachers, administrators or school board members disapprove of the ideas presented. Moreover, Principle 3a forbids narrowly partisan considerations in curriculum formation and book selection (e.g., only including books by Democrats in order to foster the ideals of the Democratic party) and Principle 3c requires that a variety of views be presented and that students be encouraged to criticize ideas and form their own views to the extent that they are intellectually capable of handling diverse points of view, criticizing ideas, and forming opinions of their own.

Empirical considerations. Young children are inclined to believe what they are told and less capable than older children of handling diverse sources of information, critically analyzing ideas, and forming their own opinions (Moshman, in preparation).

Conclusion. Given the nature of young children, schools must limit what they present and a considerable degree of inculcation is unavoidable. Such inculcation, however, should be justified on the basis of evidence about young children's limited cognitive abilities. To the extent that one unnecessarily limits the range of ideas presented and the possibility of critical analysis, one is engaged in indoctrination and thus violating Principle 3c. More systematic research on the ability of children of various ages to coordinate diverse sources of information and form their own views would be helpful in insuring that public schools do not inculcate unnecessarily and thus respect students' intellectual freedom to the extent that their cognitive abilities allow.

Religion and Prayer in Public Schools

Nature of issue. May public school teachers lead students in prayer, teach religion, or provide religious materials to students (e.g., by posting the Ten Commandments)?

Current status. Public school teachers may not lead students in prayer, read from the Bible for devotional purposes, or otherwise inculcate religion, though they may teach about religion (e.g., in a comparative religion class) (Engel v. Vitale, 1962; Abington v. Schempp, 1963). State-mandated moments of silence are unconstitutional if they are clearly intended to promote prayer (Wallace v. Jaffree, 1985).

Legal analysis. Public schools may not inculcate religion (Principle 3b) but also must not unnecessarily infringe on students' free exercise of religion (Principle 5) or be unnecessarily hostile to religion in a manner that inculcates an anti-religious ideology (Principle 3b).

Empirical considerations. Young children are highly influenced by prestigious adult models and contextual factors. The younger the child, the more likely she or he is to be influenced by a teacher's orientation toward religion as evidenced by the teacher encouraging prayer, forbidding prayer, or creating a religious or antireligious atmosphere in the classroom.

Conclusion. Although no branch of government may favor or endorse religion, the Supreme Court has been especially cautious about religion in public schools, presumably on the basis of assumptions about the impressionability of children. Psychological evidence supports this extra caution, at least with respect to young children, though the unconstitutionality of an antireligious atmosphere should also be noted.

Secular Humanism

Nature of issue. Secular humanism is attacked, particularly by fundamentalist Christians, as an atheistic ideology that proposes that the welfare of humanity is the only basis for morality and that humanity can and must solve its problems via human reasoning. Is this a religion? Is it being taught in public schools? If so, does this violate the establishment-of-religion clause of the First Amendment?

Current status. There have been two important decisions on this issue within the past few months. In Mozert v. Hawkins (1986), a Federal District Court in Tennessee ruled that parents who believed a public school reading series fostered secular humanism and thus infringed on their own religion could remove their children from that portion of the curriculum and teach them reading via an alternative means. In a more sweeping decision in Alabama (Smith v. Mobile, 1987), a Federal judge ruled that secular humanism is a religion, and that several dozen books commonly used in the Alabama public schools were fostering that religion by systematically omitting religious material and urging children to form their own values and reach their own conclusions. He ordered that those books be removed from the curriculum of all Alabama public schools.

Legal analysis. There is indeed an ideology known as secular humanism that takes an atheistic point of view and urges human solutions to human problems. Whether or not it is a religion (a matter of definition), it is clearly a point of view about fundamental human purposes and values, the central concern of most religions. It would violate religious neutrality for government to systematically inculcate this point of view (Principle 3b). Simply teaching and urging students to reason, however, serves a legitimate educational purpose and does not violate the First Amendment, even if it involves inculcation of the idea that reasoning about problems is a good way to solve them (Principle 3a).

Empirical considerations. Whether or not any given book or curriculum fosters secular humanism must be determined on the basis of detailed analysis of the content and how it is understood by children.

Conclusions. Although it is not feasible to do systematic research on children's interpretations of and reactions to every book used in any public school, it would nevertheless be helpful to have more data on what children of various ages conclude from what they read. Genuine secular humanists are rare; the absence of religion in most public school texts is due not to an intent to inculcate secular humanism but rather to the desire of publishers and school administrators to avoid controversial (including religious) content. Although the ruling in Smith v. Mobile (1987) was overly sweeping, systematic exclusion of religious content from textbooks does raise constitutional problems that deserve to be seriously addressed (Principle 3b).

Evolution/Creation

Nature of issue. Many fundamentalist Christians, who interpret the Bible literally, consider the evolutionary view that the earth is very old and that species evolve to contradict the Biblical view that the earth is relatively young and that species are fixed. May states forbid the teaching of evolution and/or require teaching of alternative ideas concerning the creation and history of the world?

Current status. The Supreme Court ruled in 1968 that an Arkansas law forbidding the teaching of evolution was religiously motivated in violation of the First Amendment (Epperson v. Arkansas, 1968). More recently, creationists have attempted to develop a "scientific" creationism that does not explicitly mention God or the Bible. They argue that scientific creationism is at least as viable as evolution as a scientific theory, and have tried to get states to pass laws requiring a "balanced treatment" of evolution and scientific creationism in all public schools. Such laws have been passed in Arkansas and Louisiana and struck down in both states as unconstitutional establishments of religion (McLean v. Arkansas, 1982). An appeal of the Louisiana decision was recently heard by the U.S. Supreme Court, which is expected to issue a decision shortly.

Legal analysis. Respect for children's intellectual rights does not require that we give equal weight to every point of view or that we ignore legitimate standards of scientific adequacy in making curriculum decisions (Principle 3a). To the extent allowed by children's cognitive competence, however (Principle 6), education in evolution should avoid indoctrination by stressing empirical evidence and scientific reasoning (Principle 3c), rather than relying on appeals to authority (Principle 3c) and censorship of creationist views (Principle 4). It should be clear to students that although they will be expected to understand the theory of evolution, they are not required to believe it (Principle 2).

Empirical considerations. There is substantial evidence that, with increasing age, children become increasingly capable of handling diverse points of view and evaluating justifications (e.g., Kitchener & King, 1981).

Conclusion. Laws mandating the teaching of "scientific creationism" are indeed unconstitutional, but even if courts strike them down this does not relieve the responsibility of science teachers, especially at secondary and college levels, to present scientific ideas responsibly, with due attention to the nature and limitations of scientific evidence (Moshman, 1985).

Values and Morality in Education

Nature of issue. Underlying most of the above issues is a general concern about whether and how public schools should address values and morality.

Current status. It is widely agreed that public schools cannot and should not be value-neutral (e.g., a teacher who discourages cheating on tests is promoting the value of honesty; a School Board that respects students' freedom of speech is promoting First Amendment values). It is also clear, however, that Americans hold a diversity of views on moral issues. Moreover, for many, values and morality are intimately linked with religious belief. It is thus far from clear what approaches to values and moral education are acceptable under the First Amendment.

Legal analysis. Inculcation of values is unavoidable and does not, in itself, violate the First Amendment, provided such inculcation has a genuine educational purpose (Principle 3a), does not have the advancement or hindrance of religion as its purpose or primary effect (Principle 3b), and avoids indoctrination by presenting as much diversity and encouraging as much questioning as is feasible, given other curricular demands and the cognitive levels of the students (Principle 3c).

Empirical considerations. There is much evidence that young children are highly impressionable and that a considerable degree of inculcation is unavoidable whenever they are around adults. Such impressionability never disappears entirely but decreases with age (Moshman, in preparation).

Conclusion. The power of government to inculcate each new generation via the public schools is a First Amendment problem worthy of serious consideration (Arons, 1983). Purposeful and systematic inculcation of values and morality by public schools, though not inherently unconstitutional, should be seriously scrutinized. Such scrutiny should consider First Amendment strictures, the nature and purpose of public schools, and the psychology of children.

Conclusion

Public schools are complex and powerful institutions, constituting government's most direct and extended interface with children. It is no surprise that they are the subject of intense political controversy. The central thesis of this paper is that we can best resolve a wide variety of public school issues via systematic application of principles derived from the First Amendment and data generated by developmental research.

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